

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN,
on Behalf of Itself and All Others Similarly
Situating,

Plaintiff,

v.

HOUSEHOLD INTERNATIONAL, INC., et al.

Defendants.

DOCKETED

AUG 09 2004

FILED
AUG 3 2004

Case No. 02-C-5893
(Consolidated)

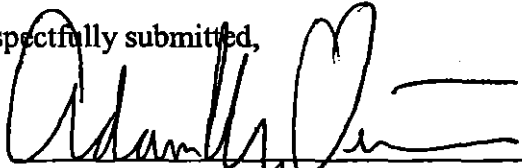
MICHAEL W. BORN
CLERK U.S. DISTRICT COURT
Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

NOTICE OF MOTION

PLEASE TAKE NOTICE that, on August 5, 2004 at 9:00 a.m., we shall appear before Magistrate Judge Nan R. Nolan in Room 1858 of the Dirksen Federal Building, 219 S. Dearborn, Chicago, Illinois, and shall then and there present Defendants' Motion for a Protective Order and Opposition to Lead Plaintiff's Motion for Protective Order, a copy of which is attached hereto.

Respectfully submitted,

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MICHAEL W. DOBBINS
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on Behalf of Itself and All Others Similarly
Situating,

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-against-

HOUSEHOLD INTERNATIONAL, INC.,
et al.,

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Lead Case No. 02-C-5893

(Consolidated)

Judge Ronald A. Guzman

Magistrate Judge Nan R. Nolan

**DEFENDANTS' MOTION FOR A PROTECTIVE ORDER AND
OPPOSITION TO LEAD PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

Pursuant to Fed. R. Civ. P. 26, defendants Household International, Inc., Household Finance Corporation (together, "Household"), William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, the "Household Defendants"), by their attorneys, and defendant Arthur Andersen LLP, by its attorneys, move for the entry of an order governing the treatment of discovery material, including confidential discovery material, in this action ("Defendants' Proposed Order"), and oppose Lead Plaintiff's Motion for Protective Order dated July 30, 2004. A copy of the Defendants' Proposed Order is attached hereto as Exhibit A. A document showing Lead Plaintiff's proposed modifications to Defendants' Proposed Order is attached hereto as Exhibit B. In support of this motion, defendants state as follows:

INTRODUCTION

1. The Court has before it two competing orders: Defendants' Proposed Order and Lead Plaintiff's proposed protective order ("Plaintiff's Proposed Order"). As set forth

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more fully below, Defendants' Proposed Order is superior because, among other things:

- Defendants' Proposed Order allows only persons essential to the prosecution or defense of this action to access confidential commercial materials. Plaintiff's Proposed Order allows Lead Plaintiff to disclose defendants' sensitive or proprietary information to virtually anyone.¹
- Defendants' Proposed Order provides that documents can be filed under seal only upon application, thus allowing specific determinations on the restriction of public access to documents which are filed with the Court. Plaintiff's Proposed Order provides for the blanket sealing of documents.²
- Defendants' Proposed Order provides a procedure for handling the inadvertent production of privileged documents. Plaintiff's Proposed Order provides no such procedure.³
- Defendants' Proposed Order is streamlined and avoids the superfluous language and provisions that pervade Lead Plaintiff's Proposed Order.⁴

As such, defendants respectfully request that the Court enter Defendants' Proposed Order.

2. Defendants request that the Court enter a protective order to ensure that defendants' discovery material is not used for any purpose other than this litigation and that defendants' confidential documents and information are not disclosed to non-parties outside of a select group of identified persons essential to this litigation. Many of the documents requested by plaintiffs contain personal financial information of Household employees, Household's internal business strategies and other proprietary Household information and personal financial information of non-parties, including Household's customers. This information is statutorily protected from disclosure and subject to protection under Fed. R. Civ. P. 26(c).

¹ See *infra* ¶ 17.

² See *infra* ¶ 23.

³ See *infra* ¶ 19.

⁴ See *infra* ¶ 21.

BACKGROUND

Local Rule 37.2 Compliance, Interim Protective Order and Defendants' Document Production

3. Lead Plaintiffs and defendants had two Local Rule 37.2 conferences and exchanged multiple drafts in an unsuccessful attempt to agree on the language of a joint proposed protective order governing the treatment of discovery material.

4. On June 10, 2004, defendants provided Lead Plaintiffs with a proposed draft protective order. On June 14, 2004, rather than providing defendants with comments on the proposed draft protective order, Lead Plaintiffs provided defendants with their own proposed draft protective order.

5. While the parties were attempting to negotiate a joint proposed protective order, upon agreement of the parties, the Court entered an Interim Stipulation and Order Governing the Confidential Treatment of Discovery Material (the "Interim Order").⁵

6. Immediately after the entry of the Interim Order, the Household Defendants produced to Lead Plaintiffs 1.8 million pages of documents in electronic format on a single hard drive. Since that time, the Household Defendants have produced an additional 42,000 pages of documents in electronic format. The Household Defendants are continuing to review and produce documents to Lead Plaintiffs on a rolling basis.

7. On June 24, 2004 and June 28, 2004, defendants and Lead Plaintiffs conducted meet and confer teleconferences to attempt to reach an agreement in principle on the substance of a proposed protective order. The Household Defendants agreed to revise and circulate a draft protective order reflecting the parties' discussions.

8. The Household Defendants later circulated a revised draft of the protective

⁵ Lead Pl.'s Mot. Ex. C.

order on behalf of all defendants. The parties exchanged comments over the next few weeks, but were unable to reach an agreement on a joint proposed protective order.

ARGUMENT

A Protective Order Is Warranted Here

9. The Federal Rules of Civil Procedure allow a district court to issue protective orders for discovery materials when good cause is shown.⁶ Rule 26(c) provides that:

Upon motion by a party ..., and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense including one or more of the following:

...

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.

The relief sought herein is in keeping with the letter and spirit of Rule 26(c).⁷

10. A court makes a determination of "good cause" by balancing the relevant interests and determining whether the specific materials should be kept out of the public record.⁸

Although "good cause" is not defined and its determination rests within the court's discretion, courts have found that "good cause" exists where it is shown that the litigant will be

⁶ See Fed. R. Civ. P. 26(c); *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994).

⁷ *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (sealing documents where property and privacy interests of the litigants predominate).

⁸ See *id.* at 946.

competitively disadvantaged if the information is accessed by its competitors.⁹

11. The circumstances presented here make out a clear case of good cause for entry of the requested protective order. Many of the *millions* of pages of documents sought by Lead Plaintiffs include, among other things, personal financial information of non-parties (Household's customers), personal financial information of individual shareholders, and internal business strategies and other Household proprietary information, which Household has endeavored at considerable expense to develop and to keep confidential. For example, Lead Plaintiffs have sought documents concerning Household's proprietary software. These are the type of documents that justify the entry of a protective order.

12. Household also has statutory obligations not to publicly reveal the customer financial information requested by Lead Plaintiff. These statutory obligations include the Fair Credit Reporting Act (15 U.S.C. § 1681, *et seq.*)¹⁰ and the Gramm-Leach-Bliley Act (15 U.S.C. § 6801, *et seq.*)¹¹ Household would be subject to statutory penalties and administrative enforcement action for failure to observe the obligations imposed by these (and other) statutes.¹²

⁹ See *Zahran v. Trans Union Corp.*, 2002 U.S. Dist. LEXIS 16791, at *3 (N.D. Ill. Sept. 5, 2002); *Magnavox Co. v. Mattel, Inc.*, 1981 U.S. Dist. LEXIS 11208, at *3 (N.D. Ill. Mar. 24, 1981).

¹⁰ 15 U.S.C. § 1681b forbids the disclosure of consumer credit reports except under certain circumstances "and no other." These circumstances include responding to a court order or Federal grand jury subpoena; acting according to written instruction from the consumer; credit transactions involving the consumer; using the information "for employment purposes;" using the information for insurance underwriting purposes; determining whether the consumer is eligible for a license or other benefit "granted by a governmental instrumentality;" evaluating credit risks associated with an existing credit obligation; uses in connection with a business transaction initiated by the consumer; reviewing an account to determine whether the consumer continues to meet the terms of the account; and disclosure to State or local child support authorities. *Id.* § 1681b(a)(1) – (5).

¹¹ See 15 U.S.C. § 6801(b)(1) (requiring financial institutions "to insure the security and confidentiality of customer record and information").

¹² See 15 U.S.C. §§ 1681n, 1681o (detailing civil penalties for willful and negligent noncompliance, respectively, with the provisions protecting consumer credit information); 15 U.S.C. § 6805(a)(7) (providing for administrative enforcement of Gramm-Leach-Bliley by the Federal Trade Commission).

13. Additionally, Lead Plaintiffs' requests seek information that is not generally known outside of Household's business, such as personal financial information of Household's customers and proprietary information relating to Household's business strategies and information networks. Household's customer information and business strategies are at the core of Household's operations and would therefore be very valuable to Household's competitors. Furthermore, Household has expended enormous amounts of time and money to develop and maintain this information. Because the information sought by Lead Plaintiff is so valuable and unique, disclosure of this information would likely result in serious injury to Household's business.

14. Defendant Arthur Andersen LLP was Household's auditor at times during the putative class period. As a result, Arthur Andersen LLP ("Andersen") has Household materials that are private and confidential, as well as materials that are confidential and proprietary to Andersen. Plaintiffs' discovery requests seek vast categories of information that is private and confidential to Andersen and that is not known or available outside of Andersen, including, but not limited to proprietary business information and strategies, the personal financial information of Andersen and/or its various members/employees during the relevant time period, and other categories of proprietary information. A protective order is thus necessary to adequately preserve the confidential, private and proprietary nature of the information and documents requested from Andersen.

15. The Defendants' Proposed Order is narrowly drawn. It contains adequate safeguards to protect the public's interest in open access to court proceedings.¹³ *First,*

¹³ Lead Plaintiffs' submission suffers from a fundamental flaw because it conflates the question of public access to documents which have been filed in a court with public access to discovery materials that have been exchanged by parties but not filed with a court. Except in extraordinary circumstances not present here, the public has *no* right to review discovery materials exchanged

the Defendants' Proposed Order defines "Confidential Information" as disclosure or discovery in this litigation that may contain "confidential, proprietary or private information for which special protection from public disclosure may be warranted under applicable law."¹⁴ This definition of "Confidential Information" is appropriately tailored to safeguard the type of information involved in this case.¹⁵ The defendants seek to protect information that fits clearly within the *Andrew* parameters.

16. *Second*, the Defendants' Proposed Order gives the Court the power, *sua sponte*, to determine that any material produced during discovery does not contain Confidential Information and should not be designated Confidential.¹⁶ The Defendants' Proposed Order also gives either party the power to object to the restriction of public access to any document proposed to be filed under seal.¹⁷

Unlike Plaintiff's Proposed Order, Defendants' Proposed Order Provides Appropriate Protection

17. Lead Plaintiff's¹⁸ proposed draft protective order ("Plaintiff's Proposed

by the parties but not filed with a court. *See* Fed. R. Civ. P. 5(d); *see generally In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (common law right of public access does not extend to discovery that is not part of the public record); *Oklahoma Hosp. Ass'n Oklahoma Publishing Co.*, 748 F.2d 1421, 1425 (10th Cir. 1984) (parties cannot be compelled to distribute unfiled discovery to public), *cert. denied*, 473 U.S. 905 (1985). Because the Defendants' Proposed Order adequately addresses the public's interest in documents that are filed with the Court and the defendants' confidentiality interests with respect to materials that are not filed with the Court, it is proper.

¹⁴ Defendants' Proposed Order at 1.

¹⁵ *See Andrew Corp. v. Rossi*, 180 F.R.D. 338, 341 (N.D. Ill. 1998) (relevant factors in determining what is confidential material include "the extent to which it is known outside of the business; the measures taken to guard the information's secrecy; the value of the information to the business or its competitors; the amount of time, money and effort expended in the development of the information; and the ease or difficulty of duplicating or properly acquiring the information").

¹⁶ *See* Defendants' Proposed Order ¶ 13.

¹⁷ *See* Defendants Proposed Order ¶ 14; *see also Citizens*, 178 F.3d at 946.

¹⁸ Only one purported Lead Plaintiff, Glickenhau Institutional Group, brings this motion. The Complaint does not identify Glickenhau Institutional Group as a plaintiff; instead, it lists

Order") does not adequately protect Confidential Information. *First*, with respect to witnesses, Defendant's Proposed Order allows Confidential Information to be shown to witnesses "called to testify under oath in the context of a deposition."¹⁹ Plaintiff's Proposed Order contains a provision allowing parties to disclose Confidential Information to "witnesses in the action to whom disclosure is reasonably necessary for purposes of this litigation" and who have agreed to abide by the order and purported authors, recipients or "original sources" of the Confidential Information.²⁰ Plaintiff's provision vitiates the protections a protective order is intended to convey. Under such a provision, outside the context of a deposition, Lead Plaintiff could show Household's proprietary information to Household's competitors under the guise of "reasonable necessity." Lead Plaintiff could also show sensitive personal financial information of Household customers or employees to non-parties prior to, or in the absence of, a noticed deposition. If such a provision were inserted, the Household Defendants would have no control over the dissemination of their sensitive information, and would not know to whom such sensitive information was shown.²¹ This type of provision is particularly troubling in this case, because Lead Plaintiffs have identified approximately 260 potential witnesses in their Initial Disclosures without addresses or business affiliation. Many of Lead Plaintiffs' alleged potential witnesses are media organizations. Thus, inclusion of such a provision would destroy any protection the protective order was intended to provide by allowing Lead Plaintiffs to unilaterally determine who should have access to unfiled discovery and permitting dissemination of Confidential

Glickenhau & Company. Glickenhau has provided no explanation for this anomaly or the absence of the other Lead Plaintiffs or proposed class representatives from the pending motion.

¹⁹ See Defendant's Proposed Order ¶ 2(iv).

²⁰ See Plaintiff's Proposed Order ¶ 19 (a), (c).

²¹ See Plaintiff's Proposed Order ¶ 20 ("Counsel that disclose confidential information to any such person shall retain the signed Confidentiality Agreement.")

Information to unnamed potential witnesses outside the context of a deposition.

18. *Second*, Lead Plaintiff refuses to include a provision making “Confidential” any portions of summaries, reports, including expert reports, or other materials that incorporate “Confidential Information.”²² Without such a provision, Lead Plaintiff could release Confidential Information by quoting or summarizing such Confidential Information in other materials without designating “Confidential” the particular portions or pages of such materials that incorporate such information. Again, without such a provision, the protections of the protective order would be eliminated.

19. *Third*, Plaintiff’s Proposed Order does not provide any procedure for handling the inadvertent production of privileged documents. Such a procedure is essential in an action as large as this one, particularly where Lead Plaintiffs have sought millions of pages of documents through extremely broad discovery. For example, Lead Plaintiffs have indicated that they intend to seek documents from 1300 branches of a Household business unit. The Household Defendants will review and produce documents with due care. However, in the event that privileged material is inadvertently produced, the defendants cannot risk Lead Plaintiff’s use of such material before the parties or the Court resolves the privileged nature of the material. Until the parties or the Court can resolve such an issue, Lead Plaintiff should refrain from using or otherwise disclosing that material. The Defendants’ Proposed Order provides a reasonable procedure for resolving claims of inadvertent production of privileged documents.²³

20. *Fourth*, the Defendants’ Proposed Order provides that, in the event that Confidential Information is subpoenaed or ordered produced, notice should be given to the entity

²² Defendants’ Proposed Order ¶ 9.

²³ See Defendant’s Proposed Order ¶¶ 17-23. This procedure includes written notice and a requirement that the parties’ meet and confer in an attempt to resolve any dispute regarding the claim of privilege or protection before approaching the Court. *Id.*

would add superfluous language and create confusing standards for compliance with the order.²⁹ Moreover, paragraph 11 of Plaintiff's Proposed Order places an unreasonable burden on a designating party to withdraw designations.³⁰ Again, Lead Plaintiffs have requested millions of pages of documents. Defendants' Proposed Order sets forth a reasonable procedure should Lead Plaintiffs disagree with any designations.

23. *Sixth*, unlike Plaintiff's Proposed Order, which provides for blanket filing under seal of documents containing Confidential Information,³¹ Defendants' Proposed Order requires that the parties obtain leave of Court to file such documents under seal.³² Thus, under Defendants' Proposed Order, the Court will be able to make a specific determination at a particular time as to whether a document should be protected from public access.

CONCLUSION

In sum, unlike Plaintiff's Proposed Order, Defendants' Proposed Order is narrowly constructed to ensure that material exchanged in discovery is used only for this litigation and that Confidential Information is adequately protected. The defendants respectfully request that the Court grant Defendants' Motion for a Protective Order, enter the Defendants' Proposed Order and deny Lead Plaintiff's motion to enter the Plaintiff's Proposed Order.

²⁹ Defendants' Proposed Order provides that confidentiality designations must be made in good faith. Defendants' Proposed Order ¶ 4.

³⁰ See Defendants' Proposed Order ¶¶ 10-11.

³¹ See Plaintiff's Proposed Order ¶ 23.

³² See Defendants' Proposed Order ¶ 12-14.

Dated: August 3, 2004

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